

Environment



Hawai'i
a monthly newsletter

Water, Water Everywhere

Well, at least the subject of water is abundant in the articles that make up most of this issue.

In Maui County, on the other hand, water itself, especially stream water, seems to be increasingly in short supply, as is evident in the disputes that Teresa Dawson reports on extensively, and exclusively, this month.

With the changing climate and ongoing drought, the stakes in these water wars could not be higher. And the role of the state Commission on Water Resource Management has never been more critical.

Also in this issue, we take another look at the difficulties created when agricultural lands are condominiumized. And when rare and endangered species are involved, as at O'ahu's Marconi Point, the troubles multiply.

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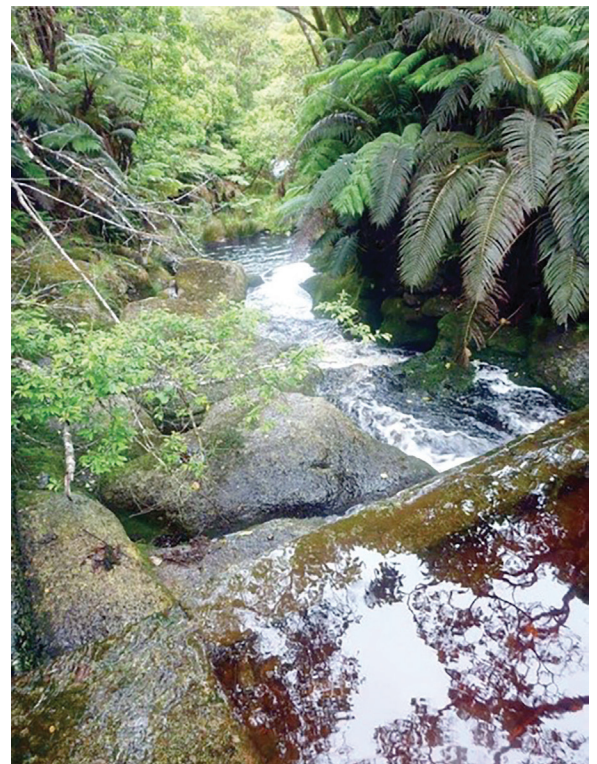
In April, press releases from the state Commission on Water Resource Management and the Earthjustice law firm trumpeted the commission's decision that month to restore five streams on Moloka'i for the first time in more than a century.

Broadcast, print, and online media all ran stories about the community-led effort to end the excessive diversion of stream water by Moloka'i Properties, Ltd., owner of Moloka'i Ranch, and to keep that water in the streams.

In July 2019, Earthjustice, on behalf of Moloka'i Nō Ka Heke, had filed with the commission a waste complaint against MPL and a petition to amend the interim instream flow standards of Kawela, Kaunakakai, Manawainui, and Waikolu streams, which the company had long diverted for its cattle and farming operations.

MPL ceased its commercial operations on the island in 2008 and put its lands there up for sale in 2017. Yet, as pointed out by Earthjustice, the company was diverting nine times the amount of water it reportedly used. This, while Kawela Stream had little to no water flowing to its mouth, and the ancient Hawaiian fishpond there was choked with overgrowth.

On April 19, after hours of impassioned public testimony from Moloka'i residents and others in favor of restoration, the commission voted to amend the IIFS of East Kawela, East Kawela Tributary, West Kawela, Lualohe, and Waikolu streams. For East Kawela, the commission set an IIFS



East Kawela Stream in May, fully restored. CREDIT: DLNR

of 340,000 gallons per day, its Q50 flow. (That is the amount of water flowing in the stream 50 percent of the time.)

The commission gave MPL 180 days to explore how it would meet its water needs under the new IIFS, and ultimately, without any water from East Kawela Stream. The commission ordered that the stream be fully restored during that 6-month assessment and made clear its goal to make that permanent at some point.

"On May 11, Commission staff led a group site visit to the East Kawela intake to implement and observe the putatively historic restoration of Kawela's flow," accord-

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NEW AND NOTEWORTHY

'Aina Le'a Update: On October 7, 3rd Circuit Judge Wendy DeWeese approved the sale of roughly 38 acres of land in the Big Island district of South Kohala to Romspen Investment, one of the several creditors of 'Aina Le'a, Inc. Romspen made a credit bid of \$13 million at the foreclosure auction of the property that was held in August.

In court, attorneys for Romspen indicated that the company may yet file an additional claim against 'Aina Le'a, seeking what is known as a deficiency judgment. That sort of claim is made when the property acquired in foreclosure is insufficient to satisfy the total debt owed to the creditor. In this case, Romspen had claimed in previous court filings that it was owed around \$18 million.

The property Romspen has acquired is the parcel that 'Aina Le'a had begun to build the townhomes that were intended to satisfy

the affordable housing requirements associated with the larger 1,000-plus acre development the company had proposed.

Exactly what the change in ownership means for the overall development is unclear at this time. A source with the Hawai'i County Planning Department said that the department had not heard from anyone with 'Aina Le'a in some months.

They have argued that the biologist hired by the developer incorrectly determined that those cave-dwelling species were not likely present since there was no source of moisture. They argue that a geotechnical report upon which the biologist relied warned of caves on the property and also found artesian springwater in five of the holes bored there.

That biologist, Steve Montgomery, conceded in a May 2022 assessment of the property that "when it comes to something that cannot be measured very objectively, such as the presence or absence in dense pahoehoe of mesocaverns with adequate organic matter and water to support endemic invertebrates, we have sparse data as discussed in this report."

Even so, given his personal exploration of caves surrounding the property, efforts of other scientists to discern caves on the property, and reading reports on the geology of the area, among other things, he concluded "with extremely high probability, caverns and mesocavern habitats sustaining a food web with resident Crustacea or arachnid do not occur on this Kauano'e parcel."

The motion was to be heard last month, but was pushed back, pending a hearing on a motion filed by the plaintiff to disqualify the law firm McCorriston Miller Mukai MacKinnon as counsel for the developers.

Late last month, Watanabe denied that motion.

Quote of the Month

"We don't have time to wait for [Moloka'i Properties] to grow a conscience."

— *Mahina Poepoe, Moloka'i resident seeking the restoration of Kawela Stream*

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Koloa Case: On November 29, Judge Kathleen Watanabe will hear a motion by E Ola Kakou Hawai'i and Friends of Maha'ulepu for a preliminary injunction to halt construction of a luxury condo project in Koloa that they believe to be home to endangered spiders and amphipods.



Kaua'i cave wolf spider CREDIT: GORDON SMITH - US FISH & WILDLIFE SERVICE

A Correction: In our October roundup covering recent decisions by the Commission on Water Resource Management, we incorrectly stated that water reservations for the Department of Hawaiian Home Lands are a public trust use. They are not. Rather, they are a public trust purpose.

Condominium Regime at Marconi Point Complicates Construction, Enforcement

“Marconi Point Condominiums is an Agricultural Condominium Property Regime (‘CPR’) in a prime oceanfront location ... east of Turtle Bay Resort next to Arnold Palmer Golf Course. All units in the CPR have private access to the sandy beach in front. Private road with security gate. The property has all utilities in place: electricity, water, cable, roadways, etc. This unit is entitled to one farm dwelling.”

That was a sales pitch for unit 1 of the 26-unit, 95.6-acre CPR located at the end of a long dirt road off Kamehameha Highway. Unit 1, spanning 4.7 acres, is one of six long, narrow lots along the beach that are split-zoned agriculture/preservation. In July 2021, it sold for \$3.6 million to Yui-Sai Kan, an international television host.

Kan's unit is one of only five within the larger property that are allowed to have a farm dwelling. But her building permit application for a residence near the shore, filed in February, has gone nowhere.

The problem, or one of them, at least, is this: In December of 2021, the Honolulu Department of Planning and Permitting issued a notice of violation to Kan for constructing concrete posts without a building permit. The notice included a stop-work order, but Kan continued building, eventually erecting a 1,000-square foot house-like structure with floor-to-ceiling ocean-facing windows, raised high off the ground.

Months later, Kan submitted a “Declaration of Compliance with Hawai'i Revised Statutes Section 46-88,” which exempts agricultural structures up to 1,000 square feet in size from building permit and building code requirements. Her declaration identified the structure as a barn and “storage/operation room.”

Because the structure lies within the county's Special Management Area, it “needs SMA approval,” said DPP inspector Emilie Marabulas, who issued the NOV.

According to Kan's consultant, Mark Howland of WHALE Environmental Services, the state Office of Conservation and Coastal Lands has taken the position that Kan needs to obtain the agreement of 85 percent of the CPR unit owners if she wants to keep the structure. *Environment Hawai'i* was not able to confirm by press time if that is, indeed, OCCL's position.

The idea that CPR owners have a shared liability for activities that occur

within the larger parcel is not completely unprecedented. In March, the DLNR's Engineering Division proposed fines up to \$65,000 against all of the CPR owners of units surrounding the Waiakalua Reservoir in North Kaua'i for failing to make required safety improvements.

At one point, according to Howland, the land use and building permit sections of the DPP disagreed over whether an SMA permit is required.



A Laysan albatross sitting on an egg at one of the Marconi Point lots under construction. CREDIT: YUE-SAI KAN

“One part of DPP is saying it's an ag lot, it doesn't require an SMA. Another one is saying it does require an SMA. We're environmental consultants, not lawyers. ... It's very confusing,” he said.

It seems, however, that the DPP has decided that an SMA permit is required for both the existing structure as well as Kan's proposed farm dwelling.

According to the DPP's Ann Arizumi, her office imposed \$1,400 in fines last month for the concrete post construction and for failure to heed the stop-work order. Because Kan's exemption declaration has not yet been approved, the “barn” structure is considered a violation, Arizumi explained.

Because the structure is in the SMA, it would seem to also violate ordinances regarding unauthorized work in the area. Violators are subject to fines of up to \$10,000 per violation, plus \$500 for each day the violation persists.

The DPP has not issued a notice of violation of SMA rules, however. “Maybe Lester [Hirano] was going to go out and issue a NOV for the SMA, but never got to it,” Arizumi said. Hirano was a planner with the DPP who had inspected the property, but very recently retired.

Marabulas noted that Kan has submitted a subdivision survey for her lot. Carving her lot out of the CPR through subdivision would obviate any need to obtain consent

from the other unit holders.

Because of the “legal quagmire,” Howland said he's told Kan that the building permit for her home is on hold until “we know what we have to do.”

He said if it's determined that an environmental assessment is required, he will do one.

With regard to environmental impacts, construction on Kan's property has already affected the regional wildlife to some degree.

Marconi Point is adjacent to an ecological restoration project at Kahuku Point that is improving habitat for wedge-tailed shearwaters, red-footed boobies, Laysan albatrosses, and great frigatebirds. In December, as the structure was being built, a Laysan albatross laid an egg nearby. To protect the bird as it nested, Kan had a shelter made of wood and black shade cloth built around it.

In an email to Kan, Sheldon Plen-

toovich, Pacific Islands coastal program manager with the U.S. Fish and Wildlife Service, thanked her for trying to protect the animal, but advised her that people should stay more than 30 feet away from Laysan albatross adults and their nests.

In addition to the albatrosses, Plentovich noted that Hawaiian green sea turtles also nest on Kan's property between May and November and endangered Hawaiian yellow-faced bees also inhabit the coastal vegetation there.

"When they [turtle hatchlings] come to the surface, artificial lights (like flood lights, street lights and even indoor lights when curtains are open) disorient them and cause them to walk inland and die of exhaustion. We know you care about these species and will keep the beach dark as you build. ... These bees are important pollinators and vital to the survival of many native plant species. Both the Hawaiian green sea turtles and Hawaiian yellow-faced bees are protected under the Endangered Species Act," Plentovich wrote.

She recommended that in addition to giving the albatrosses space, Kan should "clear plastic and fishing debris from the shoreline (to protect turtle hatchlings), turn off unnecessary lights and make sure necessary lights are shielded and use amber bulbs, especially during the sea turtle hatching season starting in July, and protect the remaining patches of natural coastal habitat to help the bees."

At a May meeting of the Ko'olau Loa Neighborhood Board, Howland reported, "Whatever mitigations the Fish and Wildlife service wants, we will employ."

Exemptions

Kan's alleged barn is not the only construction at Marconi Point that has generated concern among community members.

Buildings that look like houses — complete with windows and porches — had been built without permits in an area of the CPR where no dwellings are allowed.

Prompted by a September 2021 inquiry from state Sen. Gil Riviere, the DPP issued three notices of violation that month to the owners of units 12, 13, and 15, threatening "triple penalties" for the unpermitted house-like structures.

Those owners included an executive vice president of the Honolulu office of the real estate firm Coldwell Banker Richard Ellis (CBRE). They also included a company managed by a Bank of Hawai'i board member, the president of PBR Hawaii and Associates, and a financial advisor for LPL Financial LLC.



According to a declaration filed with the Honolulu Department of Planning and Permitting, these are not houses, but a "wood frame ag barn and storage," that do not require building permits.

Riviere contended that an amended declaration for the Marconi Point CPR, limited the number of dwellings allowed in the entire CPR to five. "What is most concerning are the four houses already built on units 12, 13, 14, and 15. I don't see any permits for those buildings," he wrote.

In her October 22, 2021 reply, Dawn Takeuchi Apuna, the deputy director for the city's Department of Planning and Permitting (and now the acting director), informed Riviere of the notices of violation that had been issued. She added that unit 14 did have an active building permit for a new agricultural dwelling converted from a single-family dwelling. In addition, lots 9 and 11 also had active building permits for farm dwelling structures, and Lot 10 had a building permit application in progress, she wrote. (This, despite the apparent prohibition on farm dwellings on units 11-15.)

A few months after those notices of violation were issued, the department closed all of the cases after each owner submitted declarations of compliance with HRS 46-88.

The two-story building on unit 12 was declared to be a "wood frame elevated agricultural accessory structure." The structures on unit 13 were a barn and tool shed. The two-story and one-story buildings on unit 15 were "woodframe ag barn and storage."

Despite the fact that the DPP no longer considered the structures on these properties to be in violation of any laws, members of the community who spoke at the May Ko'olau Loa Neighborhood Board meeting were not assuaged.

Angela Huntemer, who lives at the nearby Turtle Bay Resort, complained that a separate fence that extends to the beach,

built by the CPR developers, was also in the SMA.

"I believe it's a no-go zone without an SMA permit. ... It's not supposed to be there. There's a reason it wasn't fenced before," she said.

Another testifier argued that the exempt "farm structures" are not what they are purported to be. "They are actual homes. ... Part of the problem we run into out here [is] everybody is just doing their own thing," she said.

A December 2020 report by the state Office of Planning flagged the exemption as a potential problem in agricultural CPRs.

"To facilitate agricultural activities, agricultural buildings and structures such as barns, storage sheds, and greenhouses of no more than 1,000 square feet are also exempt from building permit and building code requirements per HRS 46-88. This has made it more difficult for the counties to pursue enforcement actions for any such structures that are subsequently used for residential purposes," the report states.

That report, which explored the practice of agricultural landowners on O'ahu pursuing CPRs in lieu of developing county-approved subdivisions, prompted the Legislature to pass House Bill 247 (Act 77) in 2021. Riviere was a co-sponsor of a companion bill in the Senate.

For CPRs proposing more than five units, Act 77 requires a county review to assess infrastructure adequacy, as well as impacts on government and sensitive environmental resources. While that would not stop unit owners from taking advantage of HRS 46-88, it might help prevent construction in ecologically sensitive areas.

— Teresa Dawson

Moloka'i *continued from page 1*

ing to a September 22 letter to the commission from Earthjustice attorney Mahesh Cleveland. MPL had shut off its diversion, allowing the stream to fill and overflow a pool behind a dam.

"[N]o water flowed into the East Kawela intake and Mountain Water System pipeline. Instead, nearly all the stream water flowed over the top of the dam into the stream bed, with a small additional amount of water flowing from the blue relief valve at the bottom of the dam," Cleveland wrote.

That triumph lasted about a month.

Moloka'i Nō Ka Heke members revisited the dam on June 23 and "found that the stream was almost entirely diverted again, with only a small trickle leaking from the relief valve," he wrote.

Commission staff found during a follow-up visit on August 5 that only 245,000 gallons per day were flowing in Kawela Stream above the dam, and 36,000 gpd flowed below it.

Because the undiverted flow was 95,000 gpd less than the IIFS the commission had set in April, *"[N]o water should have been diverted.* Yet, MPL was taking a full 85 percent of the stream flows. Even worse, the 209,000 gpd MPL was diverting that day *was nearly five times* MPL's stated non-potable uses of 42,000 gpd," Cleveland wrote.

Minimal Progress

Months before Cleveland's September letter, but after Moloka'i Nō Ka Heke discovered the failed restoration of East Kawela, MPL attorney Darene Matsuoka updated commission staff on the company's progress toward meeting its obligations under the commission's April decision.

Within 90 days of the commission's April action, MPL was to have submitted a plan for modifying the East Kawela intake, as well as a plan to modify the Lualohe intake to allow flows less than Q80 (the amount of water flowing in the stream 80 percent of the time) to be left in the stream.

And during the 180 days following the commission's decision, MPL was to also submit documents for the abandonment of the diversions of East Kawela Tributary and West Kawela, conduct a water system audit to determine evaporative and system losses and identify ways to reduce them, analyze whether wastewater reuse is a potential alternative non-potable source, and evaluate the feasibility of reconnecting the Kamoku, Lualohe, and Kalihi diversions to the water delivery system to compensate for the reduced diversion of East Kawela Stream.



East Kawela Stream in September, below the dam. CREDIT: CWRM

On July 19, Matsuoka emailed CWRM deputy director Kaleo Manuel and Ayrton Strauch, staff hydrologist with the commission's Stream Protection and Management Branch, relaying the company's request to simply cap the ends of the pipes for the East Kawela Tributary and West Kawela diversions and abandon them in place. This would obviate the need for a Stream Diversion Works Permit and minimize removal costs, which MPL estimated to be \$150,000 for each diversion.

With regard to the Lualohe intake, Matsuoka stated that based on a preliminary investigation, it would cost \$200,000 to reactivate it. "Should MPL determine that reactivation is feasible, MPL will submit its plans to modify the intake so that flows below Q80 are left in Lualohe Stream," she wrote.

MPL also did not want to modify its East Kawela diversion in the way commission staff had suggested in April. Staff had recommended building a concrete box to "raise the invert" of the intake so median flows remained in the stream. Matsuoka stated that MPL's hydrologist believed that this modification would "only capture a small fraction of the additional flows with the majority flowing past the diversion and remaining in the stream."

Although that seems to be the exact effect the commission and its staff had intended, Matsuoka suggested that the diver-

sion instead be allowed to remain as is, with water equivalent to the IIFS returned by means of a pipe 1,000 feet downstream.

She attached plans for MPL's proposed solution but added that the company would implement it "only if the Commission determines that flows below Q50 be left in the stream. In the event that the commission decides to 'fully restore' East Kawela, then the modifications would not be necessary."

On August 30, commission staff met with MPL and its consultants to discuss the company's various obligations. Staff noted that MPL's proposed East Kawela IIFS solution would not meet the commission's intent to restore stream habitat immediately below the diversion, and the proposed point of restoration could not be independently monitored by commission staff.

To address the failed restoration of East Kawela Stream, Manuel asked MPL in a September 28 letter to its attorneys to seal the intake with plywood or plastic wood "until permanent modifications are designed and approved by the Commission."

Manuel also asked that the company submit new dam and intake modification designs.

With regard to MPL's proposed plan for abandoning the East Kawela Tributary and West Kawela diversions, he made it clear that capping and leaving the infrastructure in place was insufficient. He recommended that all PVC piping within the high-water

mark be removed from the stream channels.

An Earful

By the time the Water Commission met on October 18, MPL had blocked the East Kawela intake with a piece of plywood and submitted new designs to modify the intake to meet the Q50 IIFS.

Commission staff recommended that day that the commission approve in concept MPL's plans to modify its diversion, with a 90-day deadline to submit a Stream Diversion Works Permit.

It also recommended that 1) the investigation into alleged violations of IIFS continue; 2) that MPL apply for a Stream Diversion Works Permit to abandon its East Kawela Tributary and West Kawela diversions within 30 days; 3) that the commission, MPL, and the Department of Hawaiian Home Lands continue to collaboratively investigate the feasibility of reactivating the Kamoku and Lualohe diversions; and 4) that commission staff, MPL, DHHL and Moloka'i Nō Ka Heke have regular meetings — "approximately quarterly" — "to continue the dialog towards achieving the desired management goals until such time as the Commission determines the [waste] complaint is addressed."

Matsuoka testified in support of those recommendations. Members of the public, frustrated with the apparent foot-dragging and half measures over the past six months, were not so kind.

Mahina Poepoe, a Moloka'i resident running for the state House of Representatives, said she supported the full and permanent restoration of Kawela Stream. She accused MPL and its predecessors of being terrible water stewards. She added that the drinking water contamination caused by the Navy's Red Hill facility on O'ahu underscores how a single entity's bad management can have devastating effects likely for decades to come.

"We don't have time to wait for MPL to grow a conscience. ... This is an opportunity to break that cycle and start to hold egregious water users accountable," she said.

Matsuoka reiterated MPL's support for a Q50 flow in East Kawela, but said it would fully restore the stream temporarily for the purposes of a study. "During that time period, East Kawela will be fully restored. Once staff and we looked at it, we can proceed so it's based on actual data," she said.

Commissioner Mike Buck suggested MPL could have done more in the time that it was already given to restore the stream. "Using a piece of plywood? C'mon. You can

do better than that to show you're serious," he said.

Matsuoka pointed out that the idea came from commission staff. MPL had opened its release valve below the dam, as requested, but did not foresee that debris would clog it and result in water again being diverted. "We're grateful for the community telling us," she said.

She added that after Cleveland later informed her that water was still seeping around the plywood board, MPL's system expert, ITC, came up with some new ideas and "now it looks like Kawela is completely restored."

Timmy Leong of Moloka'i Nō Ka Heke questioned how long the current fix would last. "It started with great promise, but ended in disappointing failure," he said of the commission's April decision to restore the streams. Following the restoration of East Kawela in May, he monitored the stream flow in the months that followed.

"My record of the number of days in each month Kawela Stream flowed [was] a total of 12 days out of a whole 180 days. That's how much stream flow came down to the bridge," he said, adding that he was not able to monitor flows during one of the summer months.

Despite the sporadic flows, he said he saw an increase of young fish in the stream, which attracted stilts and night herons. "One of the best things was the sound of flowing water. It was music to my ears," he said.

He said it was upsetting to see during a September site visit all of the stream flow being diverted. And on an October 14 visit, he added, "I got to witness this plywood that was supposedly to block the intake. It was also accompanied by a whole bunch of rocks. It did not stop the flow at all. ... Water was flowing there at a rate you couldn't even believe. It was like putting a band aid on a gaping wound. ...

"I have a real simple solution for this whole situation. ... That solution would be to just take out that Kawela intake and allow the stream to flow. Nobody will have to go there and monitor it. Nobody will have to go there to maintain it."

Teave Heen, also of Moloka'i Nō Ka Heke, agreed with Leong's proposed solution.

"You know Hawaiians, we don't like to waste — food, water and time," she said, lamenting that 180 days had passed and the leaking continued. "The second time," after the plywood installation — "that was hurtful. It was like a slap in the face. ... They're not taking this seriously."

Momi Afelin, environment and natural resources manager for Sustainable Moloka'i, added that it was unreasonable for the commission to ask the community to wait any longer to see Kawela Stream fully restored.

DHHL Reservation

Despite the community's repeated calls for full restoration of Kawela Stream, staff's recommendation at the October meeting was to approve diversion modifications, in concept, that would allow for just the Q50 flows to stay in the stream.

Strauch explained that this would provide sufficient water to meet all instream uses, while allowing MPL to divert enough occasional peak flow to fill its reservoirs, thereby ensuring there would be enough water to meet its own needs, as well as those of DHHL.

At its April meeting, in addition to setting interim instream flow standards for streams that feed or once fed into MPL's Mountain Water System, the commission approved a water reservation for DHHL of 150,000 gallons per day from the system. That water would serve the department's Kalama'ula tract along Moloka'i's southern coast.

Earthjustice's Cleveland argued in written and oral testimony that MPL did not need East Kawela to fill its reservoirs, since water from Lualohe and Kamoku would suffice.

He suggested that staff's recommendation to have MPL and DHHL continue discussing the reestablishment of the Lualohe and Kamoku intakes indicated that MPL was trying to hand them off to the DHHL. This, at a time when MPL was supposed to have been looking for ways to wean itself off of Kawela Stream.

"We do strongly object to the recent proposal. ... MPL is actively seeking to dispose of their alternatives. It flips the commission's decision on its head," Cleveland said.

Jonathan Scheuer, a consultant for DHHL, confirmed that DHHL and MPL had discussed the possibility of DHHL taking over the Lualohe and Kamoku intakes.

He also acknowledged that the commission's goal has been to see full restoration of Kawela. "I don't know if the ranch complied with seeing how much they can wring out of their system to allow for Kawela restoration," he said, adding that he did not believe that DHHL's water needs from the Mountain Water System should be used as an excuse to delay Kawela's restoration.

MPL's water system expert, Harold Edwards of ITC, informed the commission that the Mountain Water System fed four reservoirs, but they were all in disrepair. One had serious leakage problems. A second had significant liner damage while MPL had plans to line yet another.

He did not say when or whether fixes would be made so that the reservoirs performed as intended.

Commissioner Aurora Kagawa-Viviani, a professor at the University of Hawai'i, probed Edwards for more detail. "This was your homework assignment," she said.

Edwards explained that, basically, MPL didn't want to spend any money fixing its system so that Kawela could be restored. "The bigger issue with reservoirs, capital is not available," he said. The resources at Kawela are in good condition and workable, but there is no capital to deal with Lualohe and Kamoku, he added. His estimate that it would cost \$200,000 for each intake were educated guesses, he said.

"We had six months. The way I see it, as an instructor, to have nothing substantively written up is disappointing," Kagawa-Viviani said.

Following up on her line of questioning, commissioner Neil Hannahs asked Edwards how he decided that there was no money to make the fixes, at least to the reservoirs.

"We think reservoirs are key to water security. ... You said there is no capital. Where did you look? There are other programs out there to address this existential issue. Where did you look and find nothing available?" he asked.

Edwards said that was above his pay grade and let MPL respond.

Rather than answering Hannahs' questions, Matsuoka simply gave more specifics on the reservoirs: One is beyond repair. The smallest, with a capacity to hold 4 million gallons, will not be reactivated. One with a 15 million gallon capacity is offline. And one will be reactivated.

There is potential for MPL to look at storage and build reservoirs, but it "depends on what's available," she added.

Hannahs was not comforted. "You're stressing the demands on a diminishing public trust asset. ... Everyone should do their fair share," he said.

"I've heard no evidence we should back off the desire to restore Kawela stream to 100 percent. We've tried a couple of methods that haven't worked," he continued.

Commissioner Buck added, "Let me just remind the commission what we did approve: We said full restoration was our

goal. MPL tried to add language 'if practical.' We objected."

Strauch then explained again why he proposed a Q50 IIFS rather than full restoration: Under low flow conditions, Kawela Stream is not going to make it to the mouth from mauka to makai because it is a losing reach. Low flows do, however, benefit high elevation habitat, he said. And when there are high flows, the mouth sees a lot of flow.

"The recommendation is not going to affect stream flow at the mouth on a daily basis," he said, noting that with an IIFS at Q50, low flows will remain in the stream and diversion will occur only during high flows, and what will be diverted will be less than half of those high flows.

"If you eliminate the ability to divert in high flow events, those reservoirs are going to remain dry," he said.

Given that the DHHL has a water reservation of 150,000 gpd from the Hanalilolo intake on Waikolu Stream, Strauch said additional water sources are needed to feed the reservoirs, so 150,000 gpd can be provided on a consistent basis.

In response, Scheuer said that if DHHL's reservation of 150,000 gpd from Hanalilolo somehow affects the commission's ability to restore Kawela, he would want the ability to explore how DHHL reservations can be secured "in a way that doesn't harm public trust uses."

Given that Strauch said that instream public trust uses of Kawela Stream would be protected under a Q50 IIFS, Hannahs asked Cleveland for his thoughts.

"If that same concept can work for East Kawela, that same concept can work for other, smaller intakes," Cleveland said. During high flow events, MPL could direct water from smaller intakes into its reservoirs and there will be "far more than enough water" to meet MPL's west-side needs of 42,000 gallons per day.

"I remind us all that we're allowing these issues to be pretty badly confused," he continued, noting that the Water Commission had granted DHHL a water reservation of 150,000 from the Hanalilolo intake in the Waikolu hydrologic unit.

"We want the commission to cut through all of these excuses. ... You get so much more back for your buck restoring Kawela, instead of slicing and dicing all these different sources," he said.

'Triage'

Although Strauch's justification for recommending a Q50 IIFS was in line with the commission's desire to use reservoirs to reduce the need for stream water during

dry times, Commissioner Buck remained committed to the full restoration of Kawela Stream.

Rather than approving MPL's plans to modify its diversion to meet the Q50 IIFS and giving the company 90 days to apply for a Stream Diversion Works Permit, as staff proposed, Buck recommended that new plans be developed to fully restore Kawela Stream instead. The permit application deadline would remain the same.

He also recommended that MPL work with commission staff to immediately achieve full restoration of Kawela in the interim until plans for a permanent solution were approved.

Buck made a motion to approve staff's recommendations with those amendments. Commissioner Neil Hannahs seconded the motion.

Commissioner Wayne Katayama, however, questioned whether full restoration provided substantially more instream values than a Q50 flow.

Strauch said that it did not. He also noted that because the DHHL currently does not draw any water from MPL's water system, the company's reasonable and beneficial uses can be met with water from its reservoirs and its Hanalilolo Diversion, which takes water from Waikolu Stream. When DHHL does choose to exercise its water reservation of 150,000 gallons per day from Hanalilolo, MPL will not be able to meet its offstream water needs, he said.

"If we can get these [Q50] modifications installed, it's going to make a noticeable difference on higher elevations [and] you're still going to be able to utilize the reservoir storage capacity," he said.

"What is the risk of going from Q50 to full restoration?" Katayama asked.

Strauch replied that it leaves fewer sources available to fill the reservoirs during small peak events. "We are promoting the use of storage though dry seasons, while we protect instream values," he stressed.

Buck thanked Strauch for his explanation, then offered his own.

"We talk about values. What is the value of an unrestricted stream in Hawai'i? There are so few of them," he said, adding that there is overwhelming community support for full restoration.

"I so honor your evaluation," he continued. "Sometimes we have to do triage. We have to take more water out of one stream because we have so few opportunities to restore stream flow. ... That is an incredible public trust value."

continued on page 8

Commission Defers Vote on Hefty Fine For Flow Standard Violations at Olowalu

“I almost can’t believe I’m going to say this,” said commissioner Mike Buck before moving to defer taking action on alleged violations of the interim instream flow standard (IIFS) for Olowalu Stream in West Maui.

At the commission’s October 18 meeting, Buck said it was clear that Olowalu Water Company, which diverts water from the stream to serve 50-60 customers, had been negligent in its responsibility to meet the IIFS that the commission set on March 20, 2018.

Company representatives, who were only recently brought on board, begged for more time to address the allegations and remedy the situation.

The commission ultimately acceded.

Water Commission staff had recommended that the commission find that OWC had violated the IIFS for 553 days between January 1, 2019 and October 7 of this year.

They recommended daily fines, resulting in a proposed penalty of about \$440,000. They also recommended charging the company about \$30,000 to cover administrative fees and costs the commission incurred installing a gaging station on the stream at OWC’s request.

Whether staff will stick to these fine recommendations when the matter comes before the commission this month remains to be seen.

Winding Road

The October meeting was not the first time the OWC faced allegations of violating the Water Code. On May 15, 2018, the commission fined the company \$1,000, plus \$500 in administrative fees, for building a 30-foot long, 12-foot wide concrete dam/spillway in the stream and diverting two million gallons a day without authorization.

The commission also required OWC to submit a remediation plan within six months that would include the installation of an animal access channel and the alteration of the intake sluice gates “to prioritize water flow to the stream.”

After a June site visit with staff from the commission and the state Division of Aquatic Resources, OWC submitted a remediation plan on August 9, 2018, which was slightly revised the following month.

Staff gave OWC six months, starting in July 2018, to complete the work.

“Staff considers the period from January 2019 to the present to be the enforcement period,” the October 18 staff submittal states.

Using stream gaging data, staff found that between January 1, 2019 and March 29, 2022, “there were at least 548 days (46.3%) where the mean daily flow on Olowalu Stream, measured below Diversion 961 at the Lower Olowalu Ditch, violated the interim IFS. This occurred while OWC continued to divert water for non-public

trust uses,” staff states.

OWC diverted as much as 454,000 gallons a day, despite the IIFS not being met. Staff noted that OWC has been inconsistent, at best, in reporting to the commission the amount of water it diverts.

“Commission staff have requested that the streamflow diverted by Diversion 961 be reported in a timely manner. From 2019 to 2020, OWC failed to report diverted flow for 16 months. Since October 2021, OWC has failed to report a single value for diverted flow,” staff wrote.

On April 12, staff issued OWC a notice of alleged violation regarding its failure to meet the IIFS.

OWC replied on May 27 that it believed that the commission’s March 2018 decision regarding the IIFS allowed the company to divert up to 273,000 gallons per day and still meet the IIFS for Olowalu of 2.33 million gallons a day. This, despite the fact that the March 2018 staff report stated, “This interim IFS allows Olowalu Water Company to meet their 0.196 mgd agricultural water demand and 0.141 mgd landscaping water demand **at least 50-percent of the time** (emphasis added).”

During a July 2022 site visit with OWC and commission staff, “modifications to the diversion intake were again discussed, real-time monitoring of the Lower Olowalu Ditch and streamflow were discussed, and alternative sources of water were discussed.

Moloka‘i *continued from page 7*

ITC’s Edwards took one last stab at trying to convince the commission to stick to its Q50 IIFS for East Kawela. If the commission chooses full restoration, he warned, MPL may decide that it cannot afford to maintain the water system if it is left with the “very limited capture” from other streams.

“Somewhere down the road, when a more community-friendly, more robust MPL comes on the scene ... they’ll walk away from this thing,” he said, referring to the fact that the company’s lands are for sale.

“Let us take those meager flows above Q50 [and] keep the system going and let’s give it a few years and hopefully someday

there’s a community-friendly MPL that will bring back some economic activity without getting crazy,” he said.

Commissioner Kagawa-Viviani said it was wishful thinking that a community-friendly developer would come along. And in the end, she and the majority of the commission voted to support Buck’s motion. Commissioner Katayama was the sole dissenter.

Buck’s motion amended staff’s recommendations regarding modifications to the East Kawela intake, as well as the deadline by which MPL has to apply for a Stream Diversion Works Permit to abandon its East Kawela Tributary and West Kawela diversions (from 30 days to 90 days).

Staff’s recommendations calling for the continued investigation of alleged violations of the IIFS and of the feasibility of reactivating MPL’s Kamoku and Lualohe intakes remained unchanged.

MPL’s attorneys immediately requested a contested case hearing. Earthjustice’s Cleveland later made his own request for one, on behalf of Moloka‘i Nō Ka Heke.

(For more background, see our July 2019 EH-XTRA item, “Moloka‘i Group Seeks Restoration of Mountain Streams,” available on our website, www.environment-hawaii.org.)

—Teresa Dawson

During the site visit, the obvious points of leakage were identified in the system that should be resolved. Since that site visit, no improvements have been made. ...

"Based on the monitoring data, if OWC had not diverted volumes in excess of their need, they would have met the interim IFS more regularly," staff wrote.

Under the Water Code, the commission may impose fines of up to \$5,000 a day for IIFS violations. Staff chose to start its fine calculations using the minimum fine under the commission's penalty policy, \$250 a day.

For 553 days of not meeting the IIFS, 4 days of not meeting the IIFS after the commission had designated West Maui as a Water Management Area, and 553 days of repeat violations, staff came up with a minimum penalty of \$277,500.

That fine grew with the commission's addition of a "gravity component." Because of the risk the violations posed to the resources and because OWC refused to correct the violations after being noticed, staff recommended another \$163,250 in fines. It also recommended a fine of \$500 for administrative costs.

Staff chose not to apply a mitigative component that could have reduced the fines. "Commission staff recognize that more timely and regular communication to the diversion operator about interim IFS violations could have potentially reduced the violations. However, implementing the modifications to the intake suggested by Commission staff at the June 2018 site visit would have eliminated any potential violation," staff stated.

CWRM hydrologist Ayron Strauch told the commission last month that the intake modification aimed at ensuring the IIFS amount remains in the stream was still undone, and the low flow channel OWC constructed to meet the May 2018 commission order "does not provide any connectivity across the dam during extreme low flow conditions."

In early October, OWC proposed a settlement that would have required the company to complete many of the modifications it was already required to make. Staff rejected the offer.

"Everything they were proposing to do they were already required to do," Strauch explained, adding that there is language in the Water Code that prevents the commission from settling "if they're required to do it anyway."

Commissioner Paul Meyer asked about the basis for such a large proposed fine and

how it compared to other enforcement cases.

Commission deputy director Kaleo Manuel agreed that the fines in this case were hefty, but said they could have been a lot more. He said the fine was determined after conversations with staff. He said that the opportunities provided to OWC to meet the IIFS have gone unrecognized.

"Staff is recommending fines to show the severity of our responsibility," he said.

"Please don't interpret my question as looking for lightening or amending these recommendations. Your points are very well taken and well made and on solid ground," Meyer said.

Commission chair Suzanne Case added that there is precedent for levying large fines and that those fines have been paid.

Commissioner Neil Hannahs said that he was working for Kamehameha Schools when it "received a fine commensurate to this amount. We worked that out. It certainly got our attention. It hints that's what we're trying to accomplish here: What will it take to get someone's attention? ... It's an important enforcement tool. At this level, I think it's going to get some attention. Hopefully it'll get some reconciliation that's on the ground."

'Lame Excuses'

When it came time for OWC to testify, its attorneys Darene Mastuoka and Cal Chipchase were present, as was the company's Steve Miller.

Chipchase immediately took the blame for the settlement proposal. "I thought I was being responsive. It's on me for misunderstanding what was wanted in a proposal from us," he said.

He indicated he and Matsuoaka, who also represented Moloka'i Properties in an earlier agenda item that day, (see cover story), had not been working on the OWC case very long, "even less time than we've been on the Moloka'i Ranch stuff. You inherit some history with that. I do want to assure commission, as we've been working with OWC, our full intent to come into compliance." He said there had been some work in the last couple of weeks on the dam leak staff had identified.

"While the road to getting to compliance has been slower than it should have been it's not because of an unwillingness or indifference to doing that," he said.

He asked that the commission defer the matter for 30 days because they had only received the staff's report on Saturday, three days before the meeting.

"We haven't had an opportunity to see

if an amicable solution can be reached accepting some level of responsibility [and] working with staff to achieve the main goal of compliance moving forward, rather than bankrupting a small purveyor that has 60 customers," he said.

Buck asked Chipchase to describe what happened between May 2018 and October 2022 with regard to the system modifications.

"I can't speak to that whole history. ... I've only been involved somewhat less than the period since the NOV," Chipchase replied. He confessed that based on what he had been able to assess, OWC was, at worst, guilty of negligence, "not understanding what the situation was, what was needed to be in compliance."

He said that while he did not want to point fingers at commission staff, he believed OWC would have begun fixing the problems sooner if there had been more dialogue with staff earlier. (It should be noted that five of the IIFS violations occurred AFTER the NOV.)

"We all bear responsibility," he said.

OWC's Miller also pleaded ignorance to what happened over the past few years, since he had only been with the company for a little more than a year.

Miller said the company lost Dave Minami, who had managed the diversion system for more than 20 years. He added that new staff is learning system and all of the company's time and attention has been on meeting the IIFS for Kaua'ula Stream. That IIFS was also set in March 2018.

"There hasn't been a lot of attention on the Olowalu Diversion. It's not intentional. It may be negligence, but definitely not something our company has been trying to get away with, getting more water for our 50 users," he said.

If the commission deferred the matter, he said more work could be done on getting more specifics on what happened between 2018 and 2022.

Case seemed more concerned with what OWC could do in those 30 days to ensure it meets the IIFS.

Strauch said that back in 2018, the OWC and commission staff discussed a plan to modify the diversion so that the company would not have to worry about meeting the IIFS.

"After six months, something got shoved aside and that plan never got implemented. I can't speak to why the operator did not make necessary modifications they agreed to make," he said.

"The modifications wouldn't take very

much,” he continued. “All that needs to happen is, lower the sluice gate and open a window at the water level so only higher flows go into the ditch and low flows stay in the stream.”

“It doesn’t take an engineering degree to figure that out,” Strauch said.

Miller said that is absolutely something OWC can work on.

Hannahs asked about eliminating the leakage below the dam that staff had identified back in May 2018.

Chipchase said that according to OWC’s operations people, that had been corrected weeks ago.

Tiare Lawrence, a founding member of the non-profit Kamalu o Kahalewai who had documented OWC’s violations, was not swayed by what she called the “lame excuses from counsel.”

She asked the commission to impose the fine as recommended by staff.

“Peter Martin and his companies need to be reminded that they do not own the water,” she said, referring to OWC’s owner, who also owns the Launiupoko Irrigation Company.

Moloka’i’s Teave Heen, who had testified earlier in the meeting on the failure

of the water diverter there to restore East Kawela Stream, also supported the full fine.

“I see how much effort goes into [adopting] IIFS and see how easily they can be violated and see how easily those violations can be excused. ... Our state Water Code needs to be taken a little more seriously,” she said.

‘Really Frustrating’

Commissioner Aurora Kagawa-Viviani asked staff how many exchanges it had with OWC over the years-long enforcement period.

Strauch said he didn’t have a documentation of the number of exchanges, but said that he would run into OWC staff in the field and talk about how much water was flowing. Before Minami left OWC, Strauch said he would talk to him maybe quarterly about system operations. “Sometime in 2019, somebody decided it was not critical to make the changes,” he said.

“How many official notices were exchanged?” Kagawa-Viviani asked.

Manuel referred to the documentation in the staff submittal. He went on to lament those diverters who, through their own negligence, don’t know what’s going on.

“How do we get water users to be bet-

ter water stewards? That’s the challenge that we’re having here. We set systems and policies in place that are blatantly ignored or disregarded. The order in 2018 made it very clear it’s the obligation of diverter, not the staff to chase after them. ... The burden is not on us,” he said.

“To be honest, it’s really frustrating working and supporting staff to do this work and have private companies come up with reasons why they cannot meet their obligation. We tried to communicate with them. Nothing stopped them from making these improvements. ... While the response is they just had the submittal to review since Saturday, nothing prevented them from making the improvements. ...

“This commission has an opportunity to really help shape behavior. ... I stand here really supporting staff who are really trying to do their work. I do not recommend deferral. It’s not going to benefit anybody. We need to get action and get things done. Waiting 30 days to get improvements done that were delayed for four years is really frustrating,” he continued.

Strauch also countered Chipchase’s claim that the leaks had been fixed. “Our last site visit was October 7, 11 days ago.



Diversion dam on Olowalu Stream, with the intake next to the rock wall on the left bank. CREDIT: CWRM

The three points of leakage were still leaking," Strauch said.

Despite Manuel's plea, Buck suggested that the commission defer the matter for 30 days. "Let's see what the company can do in 30 days. Hold the level of the fine the way it is. We might end up with a better solution. I am lukewarm on that recommendation, but I think it's important that the commission at least have a discussions on that. I don't think we should reward being completely negligent on the water code," he said.

Commissioner Hannahs said he had some empathy for Chipchase, Matsuoka, and Miller because they were new to the situation. However, he added, OWC is not new.

"There is a willfulness about the negligence ... that weighs in terms of the gravity of the fine," he said.

Commissioner Kagawa-Viviani expressed her concern that after the 30 days, OWC may still request a contested case hearing on any fines.

Given that, Buck asked Meyer for his thoughts on what message the commission was sending if it voted to defer.

Meyer seemed committed to imposing some kind of fine.

"I am very very much supportive of the rule and regulations this commission has. I don't think we have to back off or modify any of those. The resource is too important," he said, warning that a lack of enforcement could "end up like another Red Hill," a case in which the U.S. Navy severely contaminated public drinking water sources.

He said he supported staff's recommendations and was uneasy putting them off for a month, but it might be worth it if it gets improvements made immediately.

He seconded Buck's motion to defer for 30 days. The motion passed unanimously.

Manuel said that staff would return with recommendations that may or may not include amendments.

— Teresa Dawson

Stream Surveys Find Full Restoration May Not Boost Species Abundance

In September, Water Commission hydrologist Ayron Strauch presented a draft proposal to amend the interim instream flow standards of 11 streams in East Maui that were not part of a 2018 contested case hearing decision and order amending about two dozen other streams in the region.

By amending the IIFS for those 11 streams, commission staff hopes to satisfy a petition filed by the Sierra Club of Hawai'i last year, and establish a water source to meet a small portion of the Department of Hawaiian Home Lands' request for 11 million gallons per day for its developments at Pūlehunui and Kēōkea-Waiohuli.

Strauch also stated that the bulk of the DHHL reservation would require the IIFS amendments for some of the streams that were part of the 2018 decision and order. He added that those IIFS were ripe for re-evaluation anyway, since new data on stream flow trends and biota have been collected.

At the commission's October 18 meeting, Strauch noted that the IIFS in the 2018 decision were based on streamflow metrics using a base period of 1942-2001. A more recent base period, 1984-2013, shows that there is less water in the streams than there used to be.

For example, from 1942-2001, West Wailuaiki Stream had a median flow of 10

cubic feet per second. But for 1984-2013, the median flow was only 8.9 cfs, a reduction of 11 percent. For Hanawi Stream, there was a 13 percent drop in median flow.

In comparing shorter, 10-year base periods, Strauch pointed out that one USGS gage on West Wailuaiki Stream showed that flows declined 36 percent between a 1987-1996 period and a 2007-2016 period.

Given the constantly changing data, Strauch said it was worth revisiting the IIFS every three to four years to make adjustments. The 2018 IIFS decision didn't consider the effects of climate change or shifts in rainfall, he said, noting that Maui has been experiencing an extended drought since the early 1970s.

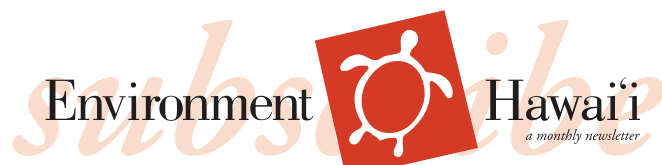
He added that East Maui has experienced annual and seasonal droughts since the early 1980s.

In addition to new information on biota provided by the state Division of Aquatic Resources, commission staff analyzed data it collected during 50 biological surveys of every hydrologic unit in East Maui to quantify habitat use by native species.

Based on all of that information, Strauch recommended amendments to the IIFS for Waikamoi, Honomanu, Nua'ailua, West Wailuaiki, and Waiohue streams.

Commission staff found that even if the streams had been largely or fully restored, that did not necessarily translate into a

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Stream Surveys *continued from page 11*

increase in the number of native species in this stream.

For example, for East Wailuaiki, West Wailuaiki, and Hanalilolilo streams, only Waiohue saw an increase in 'o'opu alamo'o in their mauka reaches after full restoration. None of them saw an increase in 'opae there.

At their mouths, no increases were seen in 'o'opu nākea, hīhīwai, oeha'a, or 'o'opu akupa after full restoration. In fact, abundances for some species dropped after full restoration.

For those streams that ended in a waterfall, only 'o'opu alamo'o were found in mauka reaches and at the mouth. Native species were most abundant in streams that emptied into estuaries.

Waikamoi Stream, where the stream mouth is an overhanging cliff, was found to support little to no recruitment of native biota.

"These data are certainly surprising to see. Were you surprised?" asked commissioner Paul Meyer.

Strauch said that while he thought there were "a lot of underlying stories to tell with the data," the take-home message was that full restoration hasn't had the impact anticipated.

Meyer questioned whether variables such as invasive species might be affecting native species abundance.

Strauch said that was something he'd like to analyze. "I think that we can try and tease apart a little bit. ... 'O'opu and 'opae can migrate more effectively than invasives," he said.

He added that a bigger question that he was unsure if anybody could answer is whether there are other factors, such as fishing in the marine environment or traditional and customary gathering, that are leading to lower abundances. "Maybe they're being fished out," he suggested.

Staff's recommendations for new IIFS were based on specific conditions of each stream. For Honomanu, Strauch said that in the last few years, even when no water is being diverted, the stream is completely drying up for periods of time. It would be impossible and unrealistic to implement an IIFS, he said.

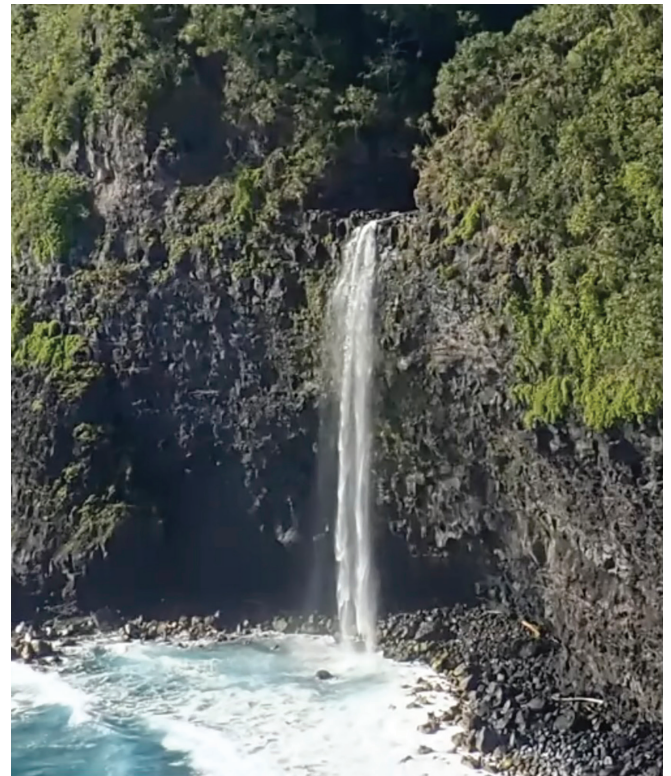
"My recommendation is to make my life easier" and seek the abandonment of three of the four diversions on the stream. "By forcing abandonment of three of four intakes, we're going to get as much water downstream as possible and to not have to enforce an IIFS that is not enforceable," he said.

He also proposed reducing the IIFS on Waikamoi, since the stream does not support high quality habitat.

For West Wailuaiki and Waiohue, which had not seen any appreciable change in biota abundance, he recommending amending the IIFS from full restoration to H90 flows, which are the flows in the stream 90 percent of the time. For West Wailuaiki, that would be 2.62 million gallons a day; for Waiohue, it would be 3.33 mgd.

For Nua'ailua, he recommended that an intake on Spreckels Ditch be abandoned because the stream supports some of the highest quality, low-elevation habitat and estuary.

Strauch said he planned to bring his recommendations for East Maui IIFS and the DHHL reservations to the commission this



Waikamoi Stream mouth. CREDIT: CWRM

month.

He said that commission staff met this past summer with Na Moku Aupuni o Ko'olau Hui, which includes native Hawaiian taro farmers and cultural practitioners from East Maui, to discuss the impending IIFS recommendations.

"They understood the reasoning for the modifications to the IIFS," he said.

Staff also met with Mahi Pono, East Maui Irrigation Company (the diverters), and the Sierra Club, he added.

"The goal is to make sure everybody is on the same page," he said.

"Hopefully we can put to rest, at least for a couple years, all the East Maui water issues," commissioner Mike Buck said.

— Teresa Dawson